

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

SECOND APPEAL NO.152 OF 2018

1. Devidas @ Shekhar s/o. Mahadeo Deokar
Age : 55 years, Occu : Agril,
R/o. Dhandharphal (Bd.), Tq. Sangamner,
Dist. Ahmednagar
 2. Vrushali Prabhakar Bhorkar,
Age : 64 years, Occu : Household,
R/o. 1/16, Shekhar Co-operative Housing
Society, Near Nanaji Hospital, Wadala Road,
Dombiwali, Tq. Kalyan, Dist. Thane
 3. Ku. Rekha @ Bali Mahadeo Deokar,
Age : 55 years, Occu : Household,
R/o. Dhandarphal (Bd.), Tq. Sangamner,
Dist. Ahmednagar
 4. Rohini Suresh Bhate,
Age : 51 years, Occu : Household,
C/o. Suresh Purushottam Bhate,
Milk Dairy Compound, Near Engineering
College, Amrutnagar, Ghulewadi,
Tq. Sangamner, Dist. Ahmednagar
- .. Appellants

Versus

1. Vasant S/o. Ganesh Deokar,
Age : 67 years, Occu : Agril,
R/o. Deepjyoti Cooperative Housing
Society, Bldg. No.1, Block No.4, Rajaji
Peth, Lane No.4, Dombiwali, Tq. Kalya,
Dist. Thane
2. Vijay s/o. Ganesh Deokar
Age : 64 years, Occu : Agril.,
R/o. Natalwada Terese, Room No.
43, 2nd Floor, Gokhale Road, South,
Dadar, Mumbai.

3. Sau. Rajani w/o. Ramchandra Kulkarni
Age : 69 years, occu : Household, R/o.
486, F-29, Mandodari Chawl, New Aadatwadi,
Mumbai.
4. Sau. Leelawati w/o. Shantaram Muley
Age : 77 years, Occu : Household,
R/o. 21-Durvankur, M.S.E.B. Housing
Society, Jail Road, Shivajinagar, Nashik
Road, Nashik, Tq. & Dist. Nashik
5. Sau. Neela w/o. Jagannath Velin,
Age : 69 years, Occu : Household,
R/o. Mruga Archana Co-operative Housing
Society, Ping Block No.14, Govindnagar, Sarojini
Naidu Road, Mulund (West), Mumbai.
6. Sau. Vaidehi w/o. Gajanan Tulpule
Age : 61 years, Occu : Household,
R/o. Datta-krupa Building 3rd Floor, Room No.
15, New Ayyar Road, Dombiwali, Tq. Kalyan,
Dist. Thane
7. Sau. Vidya w/o. Ananda Rathod
Age : 54 years, Occu : Household,
R/o. Vinay Apartment, B-Wing, 3rd Floor, Khadke
Road, Dombiwali, Tq. Kalyan, Dist. Thane
8. Smt. Saraswati w/o. Ganesh Deokar
Age : 92 years, Occu : Household,
R/o. Deepjyoti Co-operative Housing Society,
Building No.1, Block No.4, Rajaji Peth, Galli No.4,
Dombiwali, Tq. Kalyan, Dist. Thane
9. Smt. Manorama w/o. Mahadeo Deokar
Deceased.
10. Prabhakar s/o. Ramchandra Mehetre,
Age : 74 years, Occu : Agril,
R/o. Dhandarphal (Bd.), Tq. Sangamner
Dist. Ahmednagar

.. Respondents

....

Mr. A.N. Nagargoje, Advocate for the appellants
Mr. S.M. Kulkarni, Advocate for Respondent Nos.1 to 8
Respondent No.9 - Dead
Respondent No.10 – Served.

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CORAM : MANGESH S. PATIL, J.

RESERVED ON : 14-03-2022

PRONOUNCED ON : 21-03-2022

JUDGMENT :

. This is a Second Appeal by original defendants no.1 to 4 aggrieved by the judgment and decree passed by the lower appellate court reversing the judgment and order passed by the trial court which dismissed the suit filed by respondents no.1 to 8 who are the original plaintiffs, thereby decreeing the suit for partition and separate possession. The respondent nos.9 and 10 are the defendant nos.5 and 6.

2. At the stage of admission, the following substantial questions of law were formulated while directing a notice to be issued to the respondents, by the order dated 01-03-2018:

I. Whether the bar of Order II Rule 2 (3) of Civil Procedure Code attracts when the earlier suit filed for the same relief bearing R.C.S. No.261 of 1985

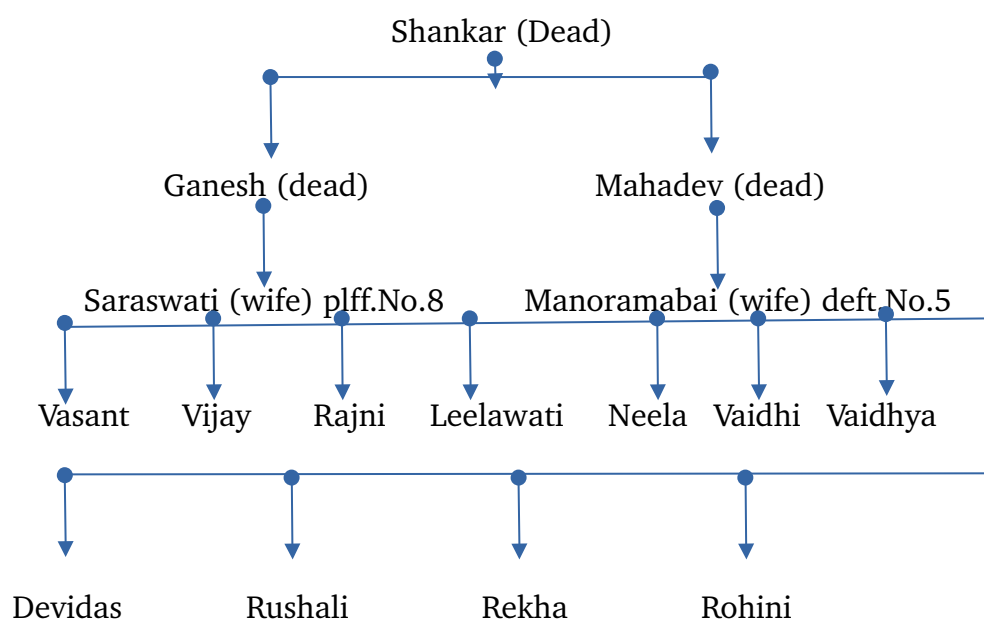
was withdrawn without seeking leave to file separate suit for the same cause ?

II. Whether the suit filed by the plaintiff was tenable on account of the non-inclusion of all joint family properties?

3. With the consent of both the sides, I have heard the Second Appeal finally on the aforementioned substantial questions and following additional substantial question:

III. Whether the suit was not maintainable in view of unconditional withdrawal of earlier suit bearing Regular Civil Suit No.261 of 1985 in view of the provisions of the Order-XXIII, Rule 1 (4) of the Code of Civil Procedure ?

4. For the sake of convenience, the parties are hereinafter referred to by their status in the suit. The plaintiffs averred that the suit properties Survey No.5/1+2A admeasuring 1 Hec. 24 Are and Survey No.5/1+2B admeasuring 40 Are were the ancestral and joint family properties. They came with following genealogy.

GENEALOGY

. The plaintiffs claim through Ganesh, whereas the defendants claim through Mahadev, who were the real brothers *inter se*. They averred that Ganesh and Mahadev had jointly purchased land Survey No.5 admeasuring 4 acres from one Ramvilas Balaram Lohati on 26-06-1936. Since then they were jointly cultivating that land. Without there being any partition, Mahadev executed a conditional sale-deed dated 08-05-1978 in favour of defendant no.6, as a result the land Survey No.5 was divided into two pieces, which are nothing but the suit properties. Subsequently, Mahadev got the land reconveyed from defendant no.6 on 19-03-1982 and a Mutation Entry No.1844 was effected to that effect. However, Mahadev illegally got entered only his name to the suit

properties and that entry was challenged in an appeal before the revenue authorities.

5. The plaintiffs further averred that they had filed Regular Civil Suit No.261 of 1985 for partition against Mahadev, however, due to oversight one of the suit properties had remained to be included and therefore, that suit was withdrawn with the permission of the court and the present suit was filed. Thus, they claimed that they have $\frac{1}{2}$ share in the suit properties and prayed for separate possession.

6. Defendant no.1 contested the suit by written statement (Exh.21), which was adopted by defendant nos.2 to 5. Defendant no.6 did not file written statement. They disputed the genealogy and *inter alia* contended that one Ramchandra was the common ancestor. He was survived by two sons Shankar and Balwant. The plaintiffs have shown genealogy of the branch of Shankar only and the branch of Balwant has not been demonstrated with a view to grab his share. They further contended that apart from the suit properties there were several other joint family properties, some of which were ancestral properties i.e. an open space bearing Grampanchayat Property No.186 and land Survey Nos.15 and 20. Since the partition is being claimed only partially, the suit was not maintainable. They further

contended that all these properties still continue to be joint and the partition should have been claimed in respect of all the properties. They further contended that while getting one of the suit properties reconveyed, the entire money was paid by Mahadev. Ganesh did not share the burden and the plaintiffs were not entitled to claim any share now. They also contended that the earlier suit bearing Regular Civil Suit No.261 of 1985 was not withdrawn with permission of the court and consequently, there was a bar for filing the present suit in view of the provision of the Order-XXIII, Rule 1 (4) of the C.P.C.

7. The learned trial judge framed necessary issues. Though it held that the suit properties were the joint family properties and the plaintiffs had $\frac{1}{2}$ share, the suit was not maintainable since the earlier suit was withdrawn without leave of the court. It also held that apart from the suit properties, the joint family owned and possessed Grampanchayat Property No.186 and land Survey Nos.15 and 20 of Dhandarphal. Since the suit was for partial partition, in spite of holding that the suit properties were the joint family properties, the suit was dismissed.

8. The plaintiffs challenged the judgment and order passed by the trial court in an appeal before the district court. By the

judgment and order under challenge, the appeal was allowed and the suit was decreed as prayed for holding the plaintiffs entitled to ½ share. Pertinently, the lower appellate court concurred with the observations and conclusions of the trial court to the effect that Grampanchayat Property No.186 and land Survey Nos.15 and 20 situated at village Dhandarphal were the joint family properties, however concluded that in view of the provision of Order-II, Rule-2 of the C.P.C. the suit was not barred for non-inclusion of these other properties, but would bar the plaintiffs from bringing second suit claiming partition of these properties which have been omitted from the present suit and reversed the finding of the trial court that the suit was barred under Order-II, Rule-2. In recording such a observation it also relied upon the decision in the case of **Dnyanu Dadu Patil Vs. Shripati Dadu Patil, Deceased by heirs and others, 2008 (1) BCJ 782.**

9. It is to be borne in mind that *ex facie* the courts below have recorded a concurrent finding of fact that apart from the suit properties, the three properties i.e. Grampanchayat Property No.186, land Survey Nos.15 and 20 of Dhandarphal are the joint family properties. Since these are concurrent findings of facts, this Court will have to proceed on the premise that those findings are correct

more so when nothing could be demonstrated on behalf of the plaintiffs as to how these conclusions are not borne out from the evidence.

10. It is, therefore, quite clear that though it is a half-hearted attempt by the plaintiffs to claim partition of only some of the properties, by virtue of Order-II, Rule-2 of the C.P.C. they can only be restrained from filing a suit claiming partition of even these excluded properties. The provision does not have the effect of non-suiting the plaintiffs as has been correctly observed by the lower appellate court by referring to the decision in the case of Dnyanu Dadu (supra).

11. In this respect it is further necessary to note that learned advocate for the plaintiffs Mr. S.M. Kulkarni, on written instructions from his client, submitted that they are ready to even include those properties in the present suit and allow the appellants (orig. defendant nos.1 to 4) to have a half share therein. If such is the state-of-affairs, since now the plaintiffs are ready to include these properties and share those with the defendants equally, it would certainly meet the ends of justice. The fact remains that the plaintiffs cannot be non-suited for not including the other properties in the present suit.

12. Though some arguments were advanced by learned advocate Mr. Nagargoje for the defendants regarding there being few more properties at Bhandup, Mumbai, there is a concurrent finding of fact by the courts below holding that there was no sufficient and cogent evidence to prove the fact which cannot be therefore now interfered with.

13. This takes us to the other objection as regards bar to the second suit if the previous one is withdrawn without the leave of the court as contemplated under Order-XXIII, Rule-1 (4) of the C.P.C. There is no dispute about the fact that Ganesh, who was the predecessor of the plaintiffs, had filed Regular Civil Suit No.261 of 1985 for partition of the suit properties against Mahadev. There is also no dispute about the fact that though the plaintiffs have erroneously averred about Ganesh having withdrawn that suit with the permission of the court, in fact no permission was sought or obtained. Therefore, at the first blush it does appear that in the absence of such leave to withdraw the suit with a condition of allowing Ganesh to file a fresh suit, the present suit being the subsequent suit would be barred by the aforementioned provision.

14. However, as is rightly pointed out by the lower appellate court relying upon the decision in the case of **Harischandra Vithoba Narawade and others Vs. Smt. Vatsalabai Narayan Shinde, 2004 (4) Mh.L.J. 897**, such a bar under Order-XXIII, Rule 1 (4) of the C.P.C. would operate only against the individual plaintiff and not against his successor in title. This court in that case has also borne in mind the disastrous consequences of not following such an interpretation in following words.

“13. The bar under Order 23, Rule 1(4) of the Code of Civil Procedure, shall operate only against the plaintiff, who institutes a suit and withdraws the same, and not against his successor-in-title, can also be demonstrated by disastrous results, which may occur in case the bar is held to operate against the successor-in-title, e.g. two brothers in a generation quarrel over the property and one files a suit for partition. Subsequently, they come to terms and decide to continue as joint family and hence the plaintiff-brother withdraws the suit for partition. If this withdrawal is to operate as a bar even against the successor-in-title by inheritance, in the next generation the descendants of the plaintiff-brother will practically stand divested of their proprietary rights in the ancestral property. This would be adjudication against their title without finding of court. Illustration should confirm that bar under Order 23, Rule 1(4) operates against the plaintiff and only against the plaintiff, who withdraws the suit. It does not operate against the successor-in-title, either by inheritance or otherwise.

It must, therefore, be held that withdrawal of Regular Civil Suit No.62 of 1973 by father Baba would not operate as bar for grant of relief in favour of daughter Vatsalabai in the present suit.”

I respectfully agree with the logic.

15. There is one more decision of a co-ordinate bench of this Court touching this aspect, in the matter of **Laxmanrao Mahadeo Nikose Vs. Narayan Mahadeo Nikose and others, 2014 (5) Mh.L.J. 772**. The sum and substance of the conclusion in that decision is that the bar under Order-XXIII, Rule 1 (4) of the C.P.C. will not apply to a suit for partition as the cause of action in such a suit would be recurring one. By referring to old decision in the matter of **Bisheshar Das and anr Vs. Ram Prasad and anr., (1891) ILR 13 All. 309** and in the matter of **Abdul Majid Kha s/o. Mahebubkha Vs. Mahmudabi w/o. Bahadurkha, AIR (36) 1949 Nagpur 366**, it was concluded in paragraph no.6 as under:

“6. From the perusal of the above decisions, it is clear that a fresh suit for partition by the same plaintiff in respect of the same subject-matter is not barred under Order-23, Rule 1 (3) as the cause of action for partition is recurring one. In the instant case, it is seen from the stand taken by respondents in the written statement dated 8-9-1986 that there is no assertion of giving any share to the plaintiff post withdrawal of the earlier suit as aforesaid but the opposition to the suit was mainly based on Order-23, Rule 1 (3) of the Code of Civil Procedure.”

16. In view of such a consistent view of this Court, though Ganesh had filed a suit for partition bearing Regular Civil Suit No.261 of 1985 seeking partition of the present suit properties and had not withdrawn it with the permission of the Court, still, the plaintiffs

being his heirs and since they would have a continuous cause of action, following the principles laid down in the case of **Harischandra Vithoba Narawade** and **Laxmanrao Mahadeo Nikose (supra)**, I find no hesitation in concurring with the conclusion drawn by the lower appellate court in discarding the stand of the defendants about bar to the suit under Order-XXIII, Rule 1 (4) of the C.P.C.

17. In view of these observations and conclusions drawn by me, I answer the substantial questions formulated herein above in the negative.

18. The upshot of the above discussion, though there is no substance in the appeal and it is liable to be dismissed, in view of supervening event whereby the respondents / plaintiffs are now seeking modification so as to include three properties i.e. Grampanchayat Property No.186 and land Survey Nos.15 and 20 of village Dhandarphal, the decree will have to be modified.

19. The Second Appeal is partly allowed.

20. The appeal is dismissed to the extent of challenge to the judgment and order passed by the lower appellate court.

21. However, the decree is modified. It is declared that the plaintiffs and defendants have equal share in not only the suit properties, but even in Grampanchayat Property No.186 and land Survey Nos.15 and 20 of village Dhandarphal.

22. The rest of the decree stands confirmed.

23. Costs in cause.

(MANGESH S. PATIL)
JUDGE

Gajanan